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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 888

UNITED STATES OF AMERICA ex rel. L. B. BIXION,
Petitioner,

v.

WILLIAM A. O'BRIEN, United States Marshal for the Eastern District of Pennsylvania

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY MEMORANDUM

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.

LEON H. KLINE,
12 South 12th Street,
Philadelphia 7, Pa.

Counsel for the Petitioner.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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It is matter for regret that the respondent Marshal is resting his opposition to the present Petition for Certiorari, not on grounds going to the public importance or to the merits of the question presented, but on two demonstrable misreadings of a perfectly clear record.

I. The respondent says (Br. Op. 7, footnote in original):

"The District Court did not make any finding of fact that the probation officer had 'imposed the unlawful restraint solely in connection with the prison sentence'. Not only is there no formal finding to this effect, but also the opinion does not contain any language intimating such a finding. The District Court merely said that the probation officer required the petitioner to report in the same manner as a parolee from March 19, 1957, to October 23, 1957.[3]"

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[3] See pages 32a and 33a of the Appendix filed in the court below."

In fact, the District Court in its opinion, at p. 32a of the Appendix, said:

"The Probation Officer, in addition to the requirements of the probation imposed upon relator on September 3, 1952, which continued until September 3, 1957, required relator to report by personal contact not less than once a week from his release date of March 19, 1957, until October 23, 1957, and relator reported in the same manner as a parolee or a person who was conditionally released for supervision."

The foregoing finding of fact was based on a document, namely, Probation Officer Boyd's letter (Ex. 16, Appendix 23a), as follows:

"First, he was under supervision of this office by reason of the probation imposed upon him on September 3, 1952, which terminated September 13, 1957.

"Secondly, in addition to the requirements of probation, I required L. B. Binion to report by personal contact not less than once a week from his release date of March 19, 1957 until October 23, 1957. Therefore, Binion reported to me in the same manner as I would require a parolee or CR

> [conditional releasee] to report for supervision. This was particularly required of Binion because no information was available relative to his status."

It is thus plain that relator was under an additional restraint in connection with the prison sentence from which he had been released on bail pursuant to this Court's order of March 11, 1957 (352 U.S. 1028).

II. The respondent further says (Br. Op. 8):

> "The Court of Appeals did not make any 'finding' that the restraint occurring prior to September 3 'derived' from both sentences. As has been shown, the decision of the Court of Appeals was based upon its legal conclusion that the increased frequency of the reporting did not result in a new status of ameliorated imprisonment so as to entitle petitioner to credit towards his prison sentence."

Here is what the Court of Appeals in fact said (Pet. 20):

> "We cannot agree with the district court that Binion, when enlarged on bond, was under no restraint other than the usual limitations of one so freed. On the contrary, Binion at the time, March 19, 1957, and until September 3, 1957, was a probationer under the Nevada sentence which clearly required reporting to his probation officer. To ignore the explicit terms of the Nevada sentence would be clearly unwarranted. It is true that, while incarcerated, he was not required to affirmatively report, for in fact he could not do so. However, upon release, the terms of his probation became operative, and he had a duty to report, for the Supreme Court's action on his request for bail did not purport to affect his status as a probationer under the Nevada sentence, but rather only went to his status under the Texas sentence. In essence,

> Binion desires double credit—for completion of his probation and completion of his sentence of imprisonment for the same reporting to or contact with his probation officer. Since he had a duty to report under the Nevada probation order until September 3, 1957, he cannot be given credit on his later sentence for reporting done prior to that date. The frequency of the reporting during this period does not create a different status as does a requirement to report when there is no duty to report at all."

Thus, very clearly, the Court of Appeals substituted its own findings for that of the District Court, which had found, on the basis of the Probation Officer's uncontradicted written statement (23a), that relator was under a double restraint between March 19 and September 13, 1957.

Accordingly, we submit that the question presented in the Petition for Certiorari was squarely raised on the record, and that, for reasons already sufficiently stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Pa.

LEON H. KLINE,
12 South 12th Street,
Philadelphia 7, Pa.

Counsel for the Petitioner.

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